No. 45575-7-II

COURT OF APPEALS DIVISION 2
OF THE STATE OF WASHINGTON

DEBORAH PERALTA,

Appellant,

v.

STATE OF WASHINGTON and WASHINGTON STATE PATROL,

Respondents.

APPELLANT'S OPENING BRIEF

Michael H. Bloom, WSB # 30845
Donald Jacobs WSB # 9300
Attorney for Appellant
One Centerpointe Drive, Ste. 570
Lake Oswego, Oregon 97035
(503) 223-2608 Fax (503) 670-7[illegible]3

ORIGINAL

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Page

Other Cases

Statutes

Page

Rules and Regulations

Other Authorities

I.
INTRODUCTION

This action arises out of an automobile/pedestrian collision. WSP Trooper Ryan Tanner ran over pedestrian Deborah Peralta. The case went to trial, and the jury returned a verdict in Peralta's favor. The jury found that Peralta suffered damages in the amount of $1,261,000, and apportioned 42% fault to the WSP and 58% fault to Peralta.

After the verdict, Peralta submitted a proposed judgment that awarded $529,620 in damages – 42% of the total damages, based on the WSP's share of the combined fault. The trial court rejected Peralta's proposed judgment and instead entered the WSP's judgment that dismissed Peralta's complaint with prejudice.

Plaintiff's first assignment of error asks this court to reverse the trial court judgment and direct the trial court to enter a new judgment, in favor of Peralta, and in the form that she presented below. In the alternative, Peralta's remaining assignments of error address evidentiary and other errors that would require a reversal of the trial court judgment and a remand for a new trial.

II.
ASSIGNMENTS OF ERROR

A. *Assignments of Error*

No. 1. The trial court erred in entering WSP's form of judgment and not Peralta's form of judgment.

No. 2. The trial court erred in excluding Tanner's admission to a paramedic that he was exceeding the posted speed limit as hearsay.

No. 3. The trial court erred in excluding the deposition testimony of WSP Sergeant Rhine that Tanner did not see Peralta before impact as hearsay.

No. 4. The trial court erred in excluding the deposition testimony of WSP Detective Ortner that Peralta was obviously groggy during her hospital interview as hearsay.

No. 5. The trial court erred in excluding the prior consistent statements made by two eyewitnesses to Luann Pfleiger that Tanner was driving without his headlights on as hearsay.

No. 6. The trial court erred in excluding the deposition testimony of WSP Trooper Riddell that his brother reported to him after the collision that he witnessed the collision, on the grounds that its probative value was outweighed by ER 403 considerations of prejudice, confusion and delay.

No. 7. The trial court erred in ruling that Peralta's discovery admission that she was under the influence of alcohol constitutes an admission that she was impaired to an "appreciable degree" as defined by RCW 46.61.502, as a matter of law.

No. 8. The trial court erred in compelling plaintiff to disclose her consulting expert's report and sanctioning her by barring her from

presenting an alcohol expert at trial.

B. ***Issues Pertaining to Assignments of Error***

No 1. Whether the trial court must honor a verdict that reflects the intent of the jury and is consistent with the law of the case as set out in the unchallenged instructions.

No. 2. Whether the trial court can exclude a prior inconsistent statement if the declarant admits to making a statement but disputes the content.

No 3. Whether a WSP Sergeant whose job duties include investigating collisions and making written findings has the authority to make statements on behalf of the WSP about Tanner's collision investigation, if he investigated the collision and made written findings.

No. 4. Whether the WSP detective who was assigned to investigate Tanner's collisions and make written findings and conclusions has the authority to make statements on behalf of the WSP about Tanner's collision investigation.

No. 5. Whether Luann Pfleiger's testimony offered to rebut the claim that two of the four eyewitness accounts were recent fabrications is hearsay.

No. 6. Whether the probative value of the testimony of Trooper Greg Riddell, offered to rebut the claim that his brother's eyewitness

account was a recent fabrication, is outweighed by ER 403 considerations of prejudice, confusion and delay.

No. 7. Whether Peralta's discovery admission that she was under influence of alcohol also constitutes an admission that she was impaired to an "appreciable degree" as defined by RCW 46.61.502, as matter of law.

No. 8. Whether a party's reliance on a consulting expert to deny a request for admission constitutes a waiver of the consulting expert's work product privilege; and, if it does, whether the trial court abused its discretion in denying Peralta the opportunity to present an alcohol expert at trial as a sanction for asserting the privilege.

III.
STATEMENT OF THE CASE

A. *Introduction*

WSP Trooper Ryan Tanner ran over Deborah Peralta, causing her to suffer severe and permanent injuries. Tanner was driving his squad car, and Peralta was standing in the street waiting for her brother to pick her up from a party that she was attending with friends.

It was dark outside, and according to four eyewitness accounts, Tanner was driving without his headlights on at the time of the collision. Peralta also maintained that Tanner was driving at an excessive speeding.

Tanner denied that he was speeding and denied that he was driving without his headlights on. He claimed that Peralta's clothing

prevented him from seeing her in time to avoid hitting her. Peralta has no memory of the events leading to her injuries.

The jury was asked to resolve the conflicting accounts of what happened, and to apportion fault without the benefit of several key pieces of evidence directly contradicting Tanner's story.

Based on the evidence it heard, the jury found in Peralta's favor. It found she suffered $1,261,000 in damages and apportioned 42% fault to the WSP and 58% fault to Peralta. The jury's verdict was based in part on instructions that Peralta was intoxicated as a matter of law, and that her intoxication-related fault would reduce her damages proportionally.

Peralta submitted a proposed judgment based on the verdict that awarded Peralta $529,620 in damages – 42% of the total damages, based on the WSP's share of the combined fault. The trial court rejected Peralta's proposed judgment and instead entered the WSP's proposed judgment that dismissed Peralta's complaint with prejudice.

The trial court applied RCW 5.40.060 to the jury's findings which nullified the jury's award of damages to Peralta. 8C RP 1971. The trial court's view was that the jury's intent did not matter, the statute barring recovery governed. 8C RP 1971. The trial court was wrong. RCW 5.040.060 was not the law of *this* case, as set out in the unchallenged jury instructions.

B. ***The trial court ordered Peralta to produce a report from a consulting expert witness, despite her objection on grounds of work product, and further prohibited her from presenting expert testimony on the subject of intoxication as a sanction.***

The serum drawn from Peralta at the hospital was measured for alcohol concentration. The concentration of alcohol in serum is usually higher than that in whole blood for the same amount of alcohol. Proof of intoxication under the "per se" prong of RCW 46.61.502 requires a whole blood alcohol measurement, not a serum alcohol measurement.[1] Converting the concentration of alcohol in serum to whole blood measurement "is far from an exact science." 5B RP 1234-35. The testing of a small sample group of 200 people resulted in the conversion ratio varying from as much 08 to 1.7. 5B RP 1235.

Plaintiff hired Dr. William Brady, the former Medical Examiner from the State of Oregon, as a consulting expert to examine the reliability of the alcohol serum measurement made on serum from Peralta at the hospital. 1 RP 27. Dr. Brady issued a written opinion casting doubt on the reliability of the results:

> This note confirms my serious concern about this specimen collection and transmission. An error here clearly challenges the reliability of the laboratory testing that establishes Ms. Peralta's alcohol level.

CP 302.

---

[1] The blood draw performed on Peralta also did not comply with the safeguards required by RCW 46.61.506 and WAC § 448-14-020.

As a result of this opinion, when the WSP asked Peralta to admit the hospital blood draw results were accurate, Peralta denied it. And when the WSP sought the basis for the Peralta's denial in an accompanying interrogatory, Peralta asserted the work product privilege. CP 44, 53-54.

The WSP filed a motion compelling Peralta to disclose the basis for her denial, including any reports that had been generated. Peralta responded by asserting the work product privilege and citing *Mothershead v. Adams* 32 Wn. App. 325, 327-28, 647 P.2d 525 (1982).

Clark County Superior Court Judge Wulle granted the WSP's motion, ordering the report be disclosed and, more significantly, imposing a sanction that Peralta be prohibited from calling any alcohol expert at trial: "Plaintiff shall be precluded from calling any expert not already disclosed on this issue." CP 106-07. After Peralta produced the report pursuant to court order, she confronted the WSP's toxicologist with its findings during his deposition. CP 118.

Pre-trial, WSP made a motion that "Plaintiff should be precluded by the Court order that was issued on June 29th, 2012, from presenting testimony of any toxicology expert pursuant to that court order," and, that Plaintiff be precluded from using Dr. Brady's report to cross examine WSP's expert toxicologist. CP 118-19.

The trial court granted the WSP's motion stating that it was bound

by "law of the case" to follow the previous judge's order. 1 RP 30.

Had Peralta been able to challenge the hospital lab tests or presents an alcohol expert, she could have lessened the impact of the trial court's eventual ruling that Peralta was legally intoxicated as a matter of law, which could have affected the jury's allocation of fault.

C. *The trial court ruled that Peralta's discovery admission that she was under influence of alcohol constituted an admission that she was impaired to an "appreciable degree" as defined by RCW 46.61.502, as matter of law.*

Whether Peralta's consumption of alcohol had impaired her ability to act to an "appreciable degree" was an important issue in the case. Proof that Peralta was impaired to an "appreciable degree" constituted negligence. Instruction 18, CP 361, app E.; Instruction 21, CP 364, app. H. It also satisfied one of the elements that WSP had to prove in order to prevail on its affirmative defense under 5.40.060. CP 8.

RCW 5.40.060 prevented Peralta from recovering if the WSP could prove that Peralta was intoxicated, her intoxication was a proximate cause of her injuries, and her fault was more than 50 percent:

> it is a complete defense to an action for damages for personal injury or wrongful death that the person injured or killed was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and that such condition was a proximate cause of the injury or death and the trier of fact finds such person to have been more than fifty percent at fault. The standard for determining whether a person was under the influence of intoxicating liquor or drugs shall be the same standard

> established for criminal convictions under RCW 46.61.502, and evidence that a person was under the influence of intoxicating liquor or drugs under the standard established by RCW 46.61.502 shall be conclusive proof that such person was under the influence of intoxicating liquor or drugs.

The standard for intoxication referenced in the statute is RCW 46.61.502, which provides in pertinent part that:

> (1) A person is guilty of driving while under the influence of intoxicating liquor ... if the person drives a vehicle within this state:
>
> (a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or
>
> ....
>
> (c) While the person is under the influence of or affected by intoxicating liquor[.]

RCW 46.61.502(1)(a), (c).

The case law interpreting term "under the influence" as used in RCW 46.61.502 requires proof of impairment to an "appreciable degree." *State v. Arndt*, 179 Wn. App. 373, 386, 320 P.3d 104 (2014). The jury was also instructed that "under the influence" requires proof of impairment to an "appreciable degree." Instruction 21, CP 364, app. H.

Pretrial, WSP submitted the following request for admission to which Peralta responded:

REQUEST FOR ADMISSION 2:

> Admit or deny that, at the time of the collision that is the subject of this lawsuit, Deborah Peralta was under the influence of intoxicating liquors.

RESPONSE:

> Plaintiff admits.

CP 146.

Based on Peralta's response, the WSP moved pre-trial that Peralta be declared under the influence for purposes of RCW 5.40.060, as a matter of law. Peralta objected, urging a distinction between simply being under the influence of alcohol and being "impaired" to a level required to violate the statute:

> We're not trying to withdraw that admission that we were under the influence of alcohol at the time, but it's a different standard under the statute. If you have any alcohol in your system, whether you're a .02 or .04, you are under the influence. You can't answer that question no if you have any alcohol in your system.

1 RP 77-78.

Peralta made clear that the level of impairment required to violate the statute had to be to an "appreciable degree," which WSP did not ask and Peralta did not admit:

> The question didn't say, were you under the influence of alcohol as defined by 46.61.502. It didn't say, were you legally intoxicated. It just says whether you're under the influence, which we admit. We can't deny that, that's going to come in, but we still feel the State has to prove

> that we were legally intoxicated.
>
> And if you look at the statute it refers to the DWI statute, 46.61.502.
>
> * * * * *
>
> And so you have to show not just that they're under the influence, but they were legally under the influence as defined by that statute. And the case law we've had for 40 years in this state talks about you have to show that their ability to operate a motor vehicle -- I realize she was a pedestrian, but that's the statute we refer to was lessened to an appreciable degree.

1 RP 78-79 (emphasis added).

Nevertheless, the court deemed the response as an admission that Peralta was intoxicated under RCW 5.40.060 and 46.61.502(1):

> I believe that she ought to be bound by her admission that she's under the influence, but it's up to the jury to determine ... [w]hether it was proximate cause of the injuries, number one, and also was it at least -- was it over 50 percent. –

1 RP 82-83.

The trial court reiterated its ruling after the defense rested and while the parties were discussing instructions:

> I believe as a matter of law based upon the response to the CR 36 request for admissions, that that issue has been conclusively established in this case. That the Plaintiff admitted being under the influence of intoxicating liquor at the time of the collision. That's my ruling.

8A RP 1723.

The court incorporated its ruling into instruction 20 (8A RP 1725-27) and the jury was instructed that the intoxication element of the WSP's

alcohol defense had been conclusively established as a matter of law:

> To establish the defense that the person injured was under the influence, the Defendant has the burden of proving each of the following propositions: First, that the person injured was under the influence of alcohol at the time of the occurrence causing the injury. Plaintiff admits this element.

CP 363, app. G (emphasis added).

Had plaintiff been allowed to contest whether her alcohol consumption impaired her abilities to an appreciable degree as is required by RCW 46.61.502 (1), then the jury would have been free to believe Christian Price's trial testimony that when she picked up Peralta to go to the party, she did not appear intoxicated; and while she was at the party, she did not observe Peralta consume any alcohol. 4A RP 800.

D. ***The jury was not allowed to hear Tanner's admission to paramedic Heather Van Zandt that he was traveling 40-50 miles per hour when he hit Peralta.***

Tanner's speed was a hotly contested issue. It was material to both negligence and causation. Tanner gave a number of estimates – and they got slower with time. 5A RP 1155-57. The last estimate he gave prior to trial was between 35 and 40 mph. 5A RP 1156. The posted speed limit for NW 78th where the collision occurred was 35 mph. 5A RP 1137.

One of the first estimates that Tanner gave, however, was to the paramedics who arrived with the ambulance within a few minutes of the collision. CP 308. It was higher than the estimates that followed.

Paramedic Heather Van Zandt signed a WSP declaration on the night of the collision stating in part: "I stuck my head out the window and asked the speed of travel – someone yelled 40-50 mph." CP 225.

WSP moved *in limine* to exclude Ms. Van Zandt and the other paramedics from testifying about speed, because they did not specifically identify Tanner as the source of the statement. CP 153.[2]

Peralta included an excerpt from Tanner's deposition testimony in opposition to the motion. The added context the excerpt provided made it reasonable to infer that Tanner was the likely source of the statement. Tanner testified that he recalls the paramedic asking him about his speed but denies telling her that he was traveling 40-50 mph:

> Q. There was a statement from one of the ambulance persons. And she says she arrived, and "I stuck my head out and asked for the speed of travel, and someone yelled, '40 to 50 miles per hour.'" That's what she states in her sworn statement.
>
> * * * * *
>
> Q. Do you recall her yelling out the window and asking what was the speed?
>
> * * * * *
>
> A. I do recall at some point, I think -- I'm not sure where they were at in the assessment or care of the patient. I recall one of the paramedics asking at some point -- and I believe they were exiting the rear of the ambulance -- for

---

[2] The paramedics cosigned a Prehospital Care Report stating that the speed of impact was "~45 mph." CP 308-309. Paramedic Jillian Kellet also signed a WSP declaration on the night of the collision stating "CCSO stated per Trooper; car was traveling approx. 45 mph." CP 153.

> the approximate speed of the vehicle. And I recall saying about 40 miles per hour. I don't believe I said 48 to 50 miles per hour. That could have been somebody else she asked. I'm not sure. I don't know.
>
> But I recall telling them, or one of the –at some point, somebody asked me. I thought it was one of the paramedics. It could have been one of the deputies exiting. I don't know. I recall answering that question with it about 40 miles per hour.

CP 216-17.

In response, WSP argued that in order to be admissible, Tanner had to admit to the content of the statement, which he would not do: "Trooper Tanner never adopted the statement; not at his deposition, not at the time of the incident. When he's asked about it again, he says, I remember saying 40 miles per hour." 1 RP 17.

The trial court agreed with WSP, stating: "I would prefer to grant the Motion in Limine unless the door is somehow opened that there's reason – that the testimony will be different than what I've already seen in the record, which directly attributes the statement to Trooper Tanner." 1 RP 23.

As a result, Peralta was unable to use the paramedic's Ms. Van Zandt's testimony to impeach Tanner's testimony that he was traveling at a "perfectly reasonable" speed for the circumstances, approximately 40 mph. 5A RP 1112-13. And that it could have been lower. 5A RP 1156.

E. ***The jury was not allowed to hear the testimony of Luann Pfleiger to rebut the WSP's charge of recent fabrication by eyewitnesses Rick Riddell and Guy Kirchgatter.***

Peralta obtained the WSP investigative file through discovery. It contained a dispatch log that identified the name, telephone number and address of an eyewitness to the collision. 1 RP 169-70. The file did not contain a statement from the witness. *Id.*

Peralta's investigator located the eyewitness and in the process uncovered three more eyewitnesses to the collision. 1 RP 172-76. All four eyewitnesses testified that Tanner was driving without his headlights on at the time of the collision.[3] 2A RP 218, 233, Riddell, R.; 2A RP 273-75 Kirchgatter, G.; 2A RP 302-04, Ashe, G.; 4A RP 923-25, Ashe, R.

In opening statement, WSP implied that the four eyewitnesses accounts were fabricated several years after the collision:

> Now, unlike some of the witnesses whose testimony you will hear in this case who came up with their story several years after the event ... .

1 RP 127.

After eyewitnesses Riddell and Kirchgatter testified were cross examined by the WSP, Peralta offered the prior consistent statements that Riddell and Kirchgatter made to Ms. Pfleiger on the night of the collision to rebut WSP's claim that the eyewitness accounts were recently

---

[3] One of the witnesses, Randy Ashe, died prior to trial. His deposition testimony was read to the jury.

fabricated.

WSP objected to the testimony as hearsay. The court sustained the objection – "my best read of the hearsay rule is that we're looking at a sustainable objection there." 2A RP 327.

Ms. Pfleiger would have testified that on the night of the collision, Mr. Riddell and Mr. Kirchgatter told Ms. Pfleiger that Tanner did not have his headlights on at the time collision. 2A RP 324.

With no prior consistent statements to restrain it, WSP was free to argue that the eyewitness accounts were not only recent fabrications, but were the result of Peralta's investigator's undue influence:

> You know, part of the difficulty is that their statements and their collective recollection, aided with the help of Mr. Bloom's investigator some three years after the incident, a lot of time had passed, a lot had faded.

8B RP 1922.

F. ***The jury was not allowed to hear the testimony of WSP Trooper Greg Riddell to rebut a charge of recent fabrication by his brother, Rick, who was an eyewitness.***

Eyewitness Rick Riddell was in such close proximity to where the collision occurred that he was the first person to render aid to Peralta. 2A RP 228-33. Rick Riddell testified that he told investigating officers at the scene that he was an eyewitness to the collision and provided his name, address, and telephone number. 2A RP 221. But when started to tell the officer that Tanner did not have his headlights on at the time of collision,

they did not want to talk to him anymore. 2A RP 221.

When no one followed up with Rick Riddell, he called his brother Greg Riddell, a WSP Trooper stationed in Spokane, and told him about the collision that he witnessed and the lack of follow up. 2A RP 232-33.

Plaintiff offered the deposition testimony of Trooper Riddell to rebut the WSP's claim that Rick Riddell's account was recently fabricated.

Trooper Greg Riddell confirmed in his deposition that shortly after the collision, his brother contacted him about the collision that he witnessed. 8B RP 1853, CP 538-40. Trooper Riddell also testified that he figured out that his brother had witnessed the same collision that involved Tanner and, as a result, reported it to his supervisor, WSP Sergeant Chris Swaggart. *Id.* Trooper Riddell testified to his knowledge, the WSP did no further follow up. CP 540-41.

WSP objected to the deposition testimony, arguing that it was "improper on rebuttal to all of a sudden introduce new witnesses covering -- I mean, this isn't responding to anything that the Defense put on. This is just wanting to introduce new witnesses in rebuttal and attach new matters." 8B RP 1854. Trooper Riddell had been listed on the WSP witness list and Peralta was not aware that the WSP would not be calling him as a witness until the day before the offer was made. 8B RP 1855.

The trial court excluded the evidence on a different ground,

however: "Rule 403 allows the Court wide latitude to exclude on the basis of prejudice, confusion or a waste of time. And the Court is inclined to deny the offer on that basis." 8B RP 1854.

Because Trooper Riddell's testimony was not admitted, the jury was left to believe WSP's argument that Rick Riddell's eyewitness account was "aided with the help of Mr. Bloom's investigator some three years after the incident." 8B RP 1922. When in fact, both Trooper Riddell and the WSP itself was aware that Rick Riddell was an eyewitness to the collision well before Peralta's investigator contacted him.

G. *The jury was not allowed to hear Tanner's admission to WSP Sergeant Rhine that he did not see Peralta before hitting her.*

Whether Tanner had his headlights on at the time of the collision was a central fact in dispute. As mentioned above, Peralta presented four independent eyewitnesses who all testified that Tanner did not have his headlights on at the time of the collision.[4]

Tanner of course denied that his headlights were off. 5A RP 1107. He testified that he saw Peralta in the middle of his lane, moving from his left to his right, well before impact. 5B RP 1161-62.[5] Whether Tanner saw Peralta before impact is circumstantial evidence on the issue of

---

[4] 2A RP 218, 233 (Riddell, R.); 2A RP 233, 273-75 (Kirhgatter, G.); 2A RP 302-04 (Ashe, G.); 4A RP 923-25 (Ashe, R.).

[5] This testimony is contradictory to the physical facts which indicate that Peralta was hit on the left side of her body. 4A RP 739-40; 6 RP 1348-49.

whether his headlights were on at the time of the collision.

Peralta offered the deposition testimony of WSP Sergeant Roy Rhine in rebuttal, to contradict and impeach Tanner's testimony that he saw Peralta prior to impact. 8B RP 1851-52. Rhine was the first WSP officer on the scene, arriving only a few minutes after the collision occurred. 5A RP 1109. Shortly after he arrived, he spoke to Tanner and later filed a report with the WSP. 8B RP 1851-52; Ex 237.

Sergeant Rhine testified in his deposition that Tanner told him that he did not see Peralta before impact:

> Q. Then you write, quote, he said he had not seen the person and struck them, unquote. He said he heard the impact and saw his windshield break. He said he got out, and it was then confirmed to him that it was a person he had hit, unquote. Do you see that from your statement?
>
> A. Yes, I do.
>
> * * * * *
>
> Q. Is that a pretty accurate statement of what he said to you?
>
> A. Yes, very accurate.
>
> Q. And the reason I'm -- I look at this and I get the impression from this statement that he may not even have seen the person, if at all, until impact.
>
> A. That's my perception, as well.
>
> * * * * *
>
> A. He told me firsthand, "I didn't see a person there."

CP 514-15.

> Q. That's what it reads like. Because the last sentence you say, "He said to that point, he wasn't sure what he had hit, that he didn't see them prior to impact."
>
> A. And that's his words.
>
> Q. And when you say he didn't see them prior to impact, I assume he's referring to the human being.
>
> A. Yes.
>
> Q. And you're certain those were his words?
>
> A. Yes.

CP 516.

WSP objected to the Rhine's testimony as hearsay, and that his deposition was not otherwise admissible because it did not meet CR 32(a)(3)'s unavailability requirements.

Peralta argued that Sergeant Rhine was an agent of the WSP under ER 801(d)(2), and thus CR 32(a)(3)'s unavailability requirements did not apply. 8B RP 1846-51.

The trial court ruled the deposition testimony was inadmissible:

> So the Court's ruling is that there would have been an opportunity either through CR 43 or through subpoena to procure the witness's attendance. There has not been a showing that he lives out of county. Therefore, under Rule 32, Court will decline the offer of the witness's deposition testimony.

8B RP 1852.

Had the jury known that Tanner's supervisor swore under oath that Tanner told him that he did not see Peralta before the impact, it would have gone a long way in not only contradicting Tanner's claim to the contrary and but also in undermining his credibility.

H. ***The jury was not allowed to hear WSP Detective Ortner's testimony that Peralta was "obviously groggy" when interviewed in the hospital after being hit by Tanner.***

As stated above, whether Tanner was driving with his headlights on or off was a central fact in dispute. Clark County Deputy Taylor was placed in charge of the investigation, and the WSP assigned one its detectives, Dave Ortner, to assist him. 6 RP 1339-40; CP 525. Both Deputy Taylor and Detective Ortner interviewed Peralta in her hospital bed two days after the collision. 6 RP 1314. Unlike their other interviews, that interview was not recorded. 6 RP 1313-14.

At trial, Deputy Taylor testified that during the interview Peralta gave incriminating statements, including a statement that the vehicle that struck her had its headlights on. 6 RP 1314-32. (Peralta has no recollection of making that statement and in fact has consistently maintained that she has no memory of the events leading up to the collision. 1 RP 13, 5A RP 999.).

When Deputy Taylor was asked in trial whether Peralta was alert and coherent during the interview, he responded that she was:

Q. When you were in that hospital room, was she groggy at all?

A. No, sir.

Q. Did you check with anybody there about any medication she might be taking?

A. No, sir.

Q. Did she appear to be on medication?

A. I have no idea. She did not appear -- she was coherent, she was alert, she was able to reflect on what had occurred and give me an accurate statement.

6 RP 1354-55.[6]

WSP Detective Ortner was also present during the interview, and he testified in his deposition that Peralta did appear "groggy" at the time of the interview:

Q. When you talked to her on the 25th, did you make any inquiries as to what type of medication she was on or her ability to respond to questions coherently?

A. I did not.

Q. Do you know if Deputy Taylor did?

A. I don't know if he asked specifically what, you know, medications she was on, but, you know, it was pretty obvious that she was a little bit groggy, I guess, so to speak.

CP 528-29.

---

[6] At the time of trial, Mr. Taylor was not a Clark County deputy, he had been dismissed for misconduct. To maintain consistency, however, plaintiff will refer to him as Deputy Taylor. 6 RP 1265-66.

Peralta offered the deposition testimony of Detective Ortner in rebuttal to contradict Taylor's testimony that Peralta was coherent and alert during the interview.

WSP objected to admission of the deposition testimony because it was hearsay and Detective Ortner was available to be subpoenaed for trial. Plaintiff argued that Detective Ortner's statements were not hearsay because he was an agent of the WSP under ER 801(d)(2), and thus CR 32(a)(3)'s unavailability requirements did not apply. 8B RP 1852-53.

The trial court excluded the deposition testimony, ruling that CR 32(a)(3)'s unavailability requirements applied, and Peralta could not make the requisite unavailability showing because Ortner resided within the county. 8B RP 1852-53.

The reliability of the statements that Peralta made during the hospital interview is important. Her statement was the only evidence, other than from Tanner himself, that contradicted the four independent witnesses' testimony that Tanner did not have his headlights on at the time of the collision.

As the WSP emphasized in closing argument:

> You know, I guess at the end of the day, the place where those four witnesses' testimony fails is that it's entirely inconsistent with Ms. Peralta's own statements.

8B RP 1923.

Had the jury heard the sworn testimony from one of the WSP's own detectives that Peralta was "groggy" during her hospital bed interview, it would have cast a shadow on the reliability of that interview.

I. *The jury's verdict, awarding Peralta damages, was not inconsistent with law it was given – the instructions and verdict form permitted the jury to award Peralta damages even if her intoxication-related fault exceeded 50 percent.*

Based on the evidence it heard and the instructions it was given, the jury returned a verdict for Peralta, finding that she suffered $1,261,000 in damages, and apportioning 42% fault to the WSP and 58% fault to Peralta. Verdict, CP 387 - 88, app. J1-2.

The award of damages was consistent with law given to the jury, as set forth in the unchallenged instructions and verdict form. Both permitted the jury to award damages to Peralta even if her intoxication-related fault exceeded 50 percent.[7] In other words, the law of this case, as set out in the unchallenged jury instructions, is that Peralta's damages should be "apportioned" between her and the WSP based on their respective shares of the combined fault.

Instruction 7 told the jurors that the allocation of fault was a straight apportionment:

---

[7] "Unchallenged" refers to the WSP's failure to except or object. Over Peralta's objection and exception, the trial court used WSP's verdict form. 8C RP 1810. Peralta also objected to the trial court's ruling that Peralta was under the influence as a matter of law.

> If you find contributory negligence, you must determine the degree of negligence, expressed as a percentage, attributable to the person claiming injury or damage. The court will furnish you [with] a special verdict form for this purpose. Your answers to the questions [o]n the special verdict form will furnish the basis by which the court will apportion damages, if any.

CP 350, app. D.

Instruction 19 told the jury to award damages to Peralta even if her intoxication-related fault exceeded 50 percent:

> It is a defense to an action for damages for personal injuries that the person injured was then under the influence of alcohol, that this condition was a proximate cause of the injury, and that the person injured was more than fifty percent at fault.

CP 362, app. F.

In fact, instruction 18 specifically told the jury that the intoxication was only a factor that "may be considered by the jury" in determining whether that person was negligent:

> A person who becomes intoxicated voluntarily is held to the same standard of care as one who is not so affected. Whether a person is intoxicated at the time of an occurrence may be considered by the jury, together with all the other facts and circumstances, in determining whether that person was negligent.

CP 361, app. E.

Finally, instruction 22 told the jury that it should only determine damages "[i]f your verdict is for the plaintiff ... " And that is exactly what the jurors did, awarding Peralta $ 1,261,000 damages. CP 365, app. I.

The instructions on the verdict form conveyed the same message as the instructions read in court – permitting the jury to award damages to Peralta even if her intoxication-related fault exceeded 50%, and that is exactly what they did. Verdict, CP 387 - 88, app. J1-2.

When the jury returned its verdict, WSP did not object or except to the verdict, nor did it mention that the jury's award of damages was inconsistent with the law of the case. 8C RP 1958-59.

J. *The jury told the trial judge that the verdict accurately reflected their intent to award Peralta the amount of damages indicated*

After the verdict was announced and while counsel was still present, the trial judge retired to the jury room and spoke to the jurors in private. 8C RP 1962-64. He explained to them that, in his view, their finding that intoxication was a proximate cause of the collision coupled with their finding that plaintiff was more than 50% at fault meant that Peralta was barred from recovering. 8C RP 1962-64. The jurors were "surprised," and "disappointed." *Id.*

They told the trial judge that they were unaware of those consequences and that was not the intention of their verdict. CP 445-53. The jurors told the trial judge that they intended to award Peralta the amount of the damages reflected in their verdict reduced by her percentage of fault. *Id.* They emphasized to the trial judge that the verdict they rendered accurately reflected that intention. *Id.*

In addition, they told the trial judge they thought that plaintiff's damages would be reduced in proportion to her share of fault, but not precluded altogether and that they believed on what they were instructed – that plaintiff "would be receiving [some] compensation:"

> "We also explained to Judge Gregerson that we were never instructed that finding Ms. Peralta' s intoxication was a proximate cause of her injury could completely bar Ms. Peralta from recovering. We understood from the instructions and the structure of the verdict form that we were only considering how much Ms. Peralta' s negligence should reduce her recovery."

CP 452-53 (Declaration of Juror Horst); CP 445-46 (Declaration of Foreman Hayes); CP 447-48 (Declaration of Juror Ford); CP 449-50 (Declaration of Juror Copple).

The trial judge returned to the courtroom but did not inform either counsel about the conversation that he had with the jury. 8C RP 1962-63. Instead he dismissed the jury. *Id.*

The following day, one of the jurors e-mailed Peralta's counsel, expressing the jury's disappointment and displeasure with how the trial judge interpreted their verdict:

> I served on the jury for Deborah Peralta. When we came to the agreement for her to receive a financial settlement, we all came into the court room believing she would be awarded the $1.2+ million (42%). Following the verdict and speaking with the Judge, was it only then, we discovered she would not receive any reward. We were all surprised and I can say, many of us disappointed. I am so sorry that somehow, every one of us, did not have an

> understanding for the ruling of the intoxication weighing as it did. I can not believe all l2 of us missed that and how it impacts the outcome. We all believed she would be receiving compensation.

CP 456.

The initial juror's e-mail prompted plaintiff's co-counsel to contact the foreman and three additional jurors. CP 454-55. They all signed declarations confirming that the verdict they rendered accurately reflected their intention to award Peralta damages. CP 445-53.

Peralta accompanied her proposed money judgment with the juror declarations. CP 442-43. WSP did not challenge the juror declarations. In fact, the trial judge himself verified their accuracy. 8C RP 1963.

K. *Notwithstanding the instructions and the verdict, the trial court entered judgment in favor of WSP.*

Peralta submitted a proposed money judgment reflecting the jury's verdict. CP 442-43. WSP submitted a proposed judgment that dismissed Peralta's complaint with prejudice. CP 497.

WSP contended that because the jury found Peralta more than 50 percent at fault and that alcohol was a proximate cause of the collision, RCW 5.40.060 acted to prohibit Peralta from recovering the jury's damage award.

Peralta disagreed – the jury was never instructed that RCW 5.40.060 barred Peralta from recovering, and thus it was not the law of this case. CP 434-41; 484-90.

The trial court sided with the WSP. Instead of entering a judgment on the jury's verdict, he entered a judgment in favor of the WSP. 8C RP 1972, CP 496-97.

IV.
ARGUMENT

A. *Assignment of error No. 1 – The trial court erred in entering WSP's form of judgment and not Peralta's form of judgment.*

1. Standard of Review

The legal effect of a jury verdict is reviewed *de novo*. *Estate of Dormaier v. Columbia Basin Anesthesia*, P.L.L.C., 177 Wn. App. 828, 866, 313 P.3d 431 (2013). Once a jury renders a verdict, the trial court must declare its legal effect and enter a judgment upon it where appropriate. *Dep't of Highways v. Evans Engine & Equip. Co., 22* Wn. App. 202, 205-06, 589 P.2d 290 (1978).

The court's duty in interpreting a verdict is to discern and implement the jury's intent, if consistent with the law of the case. *Wright v. Safeway Stores, Inc.*, 7 Wn.2d 341, 344, 109 P.2d 542 (1941). "The jury's intent is to be arrived at by regarding the verdict liberally, with the sole view of ascertaining the meaning of the jury, and not under the

technical rules of construction which are applicable to pleadings." *Cameron v. Stack-Gibbs Lumber Co.*, 68 Wash. 539, 544, 123 P. 1001 (1912).

Thus, in interpreting the verdict, this court must determine: 1) the jury's intent and 2) whether its verdict is consistent with the law of the case. The law of the case is that set out in the unchallenged jury instructions. *See, e.g., State v. Perez-Cervantes*, 141 Wn.2d 468, 475-76, 6 P.3d 1160 (2000).

Here the jury's intent as reflected by the verdict, the post-verdict declarations, and the trial court statements is crystal clear – it was to award Peralta money damages. It is equally clear that the jury's verdict is consistent with the law of this case as set out in the unchallenged jury instructions.

2. The jury's intent was to award Peralta money damages

a. The intent was clear from the verdict

To start with, the jury's verdict reflects a clear intent to award Peralta money damages. It is plain, simple, and unambiguous. The jurors found that defendant was 42% negligent, that plaintiff was 58% negligent, and that plaintiff suffered $1,261,000 in total damages:

> We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: Was the defendant negligent?

ANSWER: *Yes* (Write "yes" or "no")

If you answered "no" to Question 1, sign this verdict form. If you answered "yes" to Question 1, answer Question 2.

QUESTION 2: Was the defendant's negligence a proximate cause of injury to the plaintiff?

ANSWER: *Yes* (Write "yes" or "no")

If you answered "no" to Question 2, sign this verdict form. If you answered "yes" to Question 2, answer Question 3.

QUESTION 3: Was the plaintiff negligent?

ANSWER: *Yes* (Write "yes" or "no")

If you answered "yes" to Question 3, answer Question 4. If you answered "no" to Question 3, skip to Question 7.

QUESTION 4: Was the plaintiff's negligence a proximate cause of the injury or damage to the plaintiff?

ANSWER: *Yes* (Write "yes" or "no")

If you answered "yes" to Question 4, answer Question 5. If you answered "no" to Question 4, skip to Question 7.

QUESTION 5: Was the fact that plaintiff was under the influence of alcohol a proximate cause of her injury?

ANSWER: *Yes* (Write "yes" or "no")

QUESTION 6: Assume that 100% represents the total combined fault that proximately caused the plaintiff's injury. What percentage of this 100% is attributable to the plaintiff's negligence and what percentage of this 100% is attributable to the negligence of the defendant? Your total must equal 100%.

ANSWER:

To Plaintiff Deborah Peralta: *58* %

To Defendant Washington State Patrol: *42* %

QUESTION 7: What is the total amount of plaintiff's damages?

Economic Damages: $ *511,000*
Non-economic Damages: $ *750,000*

TOTAL: $ *1,261,000*

Sign this verdict form and notify the bailiff.

DATE: *9/20/13* */s/*
Presiding Juror

(Italics indicate handwriting.)

The intent is unmistakable – the jury intended to award Peralta money damages.

b. The intent was clear from the jurors' declarations

The juror's post-trial declarations also reflects an intent to award Peralta money damages. CP 445-53. Washington law allows this Court to consider juror affidavits or declarations to explain a verdict. If the purpose is to impeach a verdict, however, the information is limited to information that does not "inhere in the verdict." *Marvik v. Winkelman*, 126 Wn. App. 655, 661-62, 109 P.3d 47 (2005) (internal citations omitted).

In contrast, here, the juror declarations are offered to support, not impeach, the verdict. Indeed, other courts have long drawn precisely this

distinction.[8] In fact, in *Marvik*, the trial court properly considered a juror declaration to support a verdict: "The jury made a decision of a total verdict for the plaintiff in the amount of $ 21,290.72. This included the $ 13,290.72 for medical bills that the court directed us to include in the verdict. The balance of the $ 21,290.72 was for all other damages." *Id.* at 662 n.5

c. The intent was clear from the trial judge's on-the-record statements

In addition to the unambiguous verdict and the juror declarations, this court has the on-the-record representations of the trial judge who spoke to the jury in the jury room and vouched for the accuracy of the jurors' declarations:

> [MR. BLOOM]: And I assume the declarations are more or less accurate for what they relay.
>
> [THE COURT: I think they probably are. I think it's probably accurate that they -- at least some of them may have been surprised or, to be generous, you know, disappointed, I guess, as to what the net effect of their verdict was. And so I'm very familiar with the issue and the question of the instructions and whether or not there was some confusion by the jurors under the circumstances.

---

[8] *See, e.g., State v. Hayes*, 637 S.W.2d 33, 39-40 (Mo. App. 1982) ("Our Supreme Court has held that the affidavit of jurors may be received in support of and to uphold the verdict, though not to contradict or destroy it."); *Bahamas Agricultural Industries, Ltd. v. Riley Stoker Corp.*, 526 F.2d 1174, 1182 (6th Cir. Ohio 1975) (although juror affidavits are not admissible to impeach the verdict, they "may be used to show the intent of the jurors in support of their verdict); *Maring-Crawford Motor Co. v. Smith*, 233 So. 2d 484, 494 (Ala. 1970) ("evidence of jurors is admissible to sustain their verdict").

8C RP 1963.

In summary, the verdict and juror's undisputed statements make clear that the jury's intent was to award Peralta money damages.

3. The verdict was consistent with the law of this case, as set out in the unchallenged jury instructions.

The verdict awarding Peralta money damages is also consistent with the law of this case. The law of this case is set out in the unchallenged jury instructions. And those instructions permitted the jury to award damages to Peralta even if her intoxication-related fault exceeded 50 percent.

a. The law of the case doctrine

"The law of the case is an established doctrine with roots reaching back to the earliest days of statehood." *State v. Hickman*, 135 Wn.2d 97, 101, 954 P.2d 900 (1998) (footnote omitted). The doctrine provides that "jury instructions not objected to become the law of the case," *id.* at 102, and thus control the entry of judgment.

Take, for example, a criminal case. If an unopposed instruction adds an element to the crime charged, the State assumes the burden of proving the additional element and cannot obtain a judgment of conviction without such proof. *Hickman*, 135 Wn.2d at 102.; *see also State v. Benitez*, 175 Wn. App. 116, 302 P.3d 877 (2013) ("In a criminal case, if the State adds an unnecessary element in the 'to convict' instruction

without objection, the State assumes the burden of proving the added element.").

The same goes for civil cases. Unopposed instructions can change the law for any given case, modifying what would otherwise be a valid claim or defense. For example, in *Thomas v. French*, 30 Wn. App. 811, 817, 638 P.2d 613 (1981), *rev'd on other grounds*, 99 Wn.2d 95, 659 P.2d 1097 (1983), the defendant did not except to an instruction that emotional distress is compensable for a breach of contract that is merely "negligent." That became the "law of the case," notwithstanding the rule that a breach must be intentional, wanton, or reckless to support an award of emotional-distress damages. *Id.*

In *Nguyen v. Glendale Construction Co.*, 56 Wn. App. 196, 202, 782 P.2d 1110 (1989), the builder's insurer lost a time-limit defense to a warranty claim because it did not except to instructions that negated the defense. In *Gorman v. Pierce County*, 176 Wn. App. 63, 88, 307 P.3d 795 (2013), the plaintiff could not argue that contributory negligence was not a defense to her claim, because she did not challenge an instruction to the contrary.

Lastly, in *Garcia v. Brulotte*, 94 Wn.2d 794, 620 P.2d 99 (1980), the court set aside a special verdict because at least ten jurors did not agree on all answers to all questions, as required by an instruction to which no

exception was taken. Without deciding whether Washington should adopt a rule that the same jurors must assent on all issues, the *Garcia* court held that the rule was the law for that case, based on the unchallenged instruction.

b. The jury instructions permitted the jury to award damages to Peralta even if her intoxication-related fault exceeded 50 percent.

The law for *this* case, as set forth in the unchallenged instructions, permitted the jury to award damages to Peralta even if her intoxication-related fault exceeded 50 percent. The law for *this* case, as set forth in the unchallenged instructions told the jurors that plaintiff's fault, as determined by them, would only diminish her damages proportionally – not bar recovery altogether.

Instruction 7 told the jurors just that:

> If you find contributory negligence, you must determine the degree of negligence, expressed as a percentage, attributable to the person claiming injury or damage. The court will furnish you [with] a special verdict form for this purpose. Your answers to the questions [o]n the special verdict from will furnish the basis by which the court will apportion damages, if any.

Instruction 7 did not inform the jurors that, as provided in RCW 5.40.060, plaintiff's negligence would *bar* her recovery, not simply *reduce* it, if her negligence included intoxication, it was a proximate cause of the collision, and her share of the fault exceeded fifty percent. Nor did <u>any</u> later instruction convey that message.

Instruction 19, the RCW 5.40.060 instruction, told the jurors that "[i]t is a defense to an action for damages for personal injuries that the person injured was under the influence of alcohol, that this condition was a proximate cause of the injury, and that the person injured was more than fifty percent at fault." But the instruction did not say that those circumstances – intoxication, proximate cause and fault above fifty percent – would provide a "complete defense" to the action, merely that they provided a "defense."[9]

A *defense* and a *complete defense* are not the same thing. A *defense* reduces the recovery. A *complete defense* bars it. To put it the other way around, a defense lessens liability, while a complete defense eliminates it.[10]

---

[9] The trial court recognized that the jury instructions only told the jury to apportion fault and the bar to recovery was only found in the statute: "We have this strange anomaly where we have Pattern Instructions that ask them to calculate percentage of fault and yet we have the absolute bar to recovery based on the intoxication statute." 8C RP 1963.

[10] Other defenses that reduce, but do not bar, all damages include set off, *see* RCW 4.22.060(2); avoidable injury, mitigation of damages, and unreasonable assumption of risk, *see* RCW 4.22.015; pre-existing conditions, *see* WPI 30.17; collateral sources, *see* RCW 7.70.080; liquidation of damages, *see, e.g.*, RCW 62A.2-718, and disclaimer, *see* RCW 62A.-719.

Other statutes like RCW 5.40.060 create a "complete defense" to actions of one type or another. *See, e.g.*, RCW 4.24.420 ("It is a *complete defense* to any action for damages for personal injury or wrongful death that the person injured or killed was engaged in the commission of a felony at the time of the occurrence causing the injury or death and the felony was a proximate cause of the injury or death.") (emphasis added); RCW 16.080.060 ("Proof of provocation of the attack by the injured person shall be a *complete defense* to an action for damages [for dog bite].") (emphasis added).

Contributory negligence, for example, is a defense. RCW 4.22.005 provides, consistent with instruction 7, that the fault of the plaintiff in an action for injury, death, or property damages reduces the recovery proportionally. Intoxication is a specific form of contributory negligence.

In fact, instruction 18 specifically told the jury that the intoxication was only a factor that "may be considered by the jury" in determining whether that person was negligent:

> A person who becomes intoxicated voluntarily is held to the same standard of care as one who is not so affected. Whether a person is intoxicated at the time of an occurrence may be considered by the jury, together with all the other facts and circumstances, in determining whether that person was negligent.

Finally, instruction 22 told jury that it should only determine damages "[i]f your verdict is for the plaintiff ... " And that is exactly what the jurors did, their verdict was for Peralta so they determined her damages – $ 1,261,000.

If the WSP wanted to prevent this result, it could have requested an instruction that intoxication-related fault greater than 50% is a complete defense and would preclude Peralta from recovering any damages. But it did not. Instead, it requested, and the trial court gave, an instruction (number 19) that those things constituted a mere "defense."

Instruction 19 combined with instruction 18, that "[w]hether a person is intoxicated at the time of an occurrence may be considered by

the jury, together with all other facts and circumstances, in determining whether that person was negligent," and instruction 7, the contributory negligence instruction, discussed above, informed the jury that, for this case, plaintiff's intoxication would not bar her recovery, but could serve to reduce it by supporting a finding that she was herself negligent.

c. The verdict form permitted the jury to award damages to Peralta even if her intoxication-related fault exceeded 50 percent

The instructions on the verdict form conveyed the same message as the instructions read in court. The verdict form instructions directed the jurors to answer the last question, Question Number 7, which asked for the amount of plaintiff's damages, *unless* the jurors found that defendant was not negligent or that defendant's negligence was not a proximate cause of plaintiff's injuries. As explained below, under the verdict form instructions, it did not matter whether the jurors also found that plaintiff's negligence included intoxication or that her share of the combined negligence exceeded defendant's share. Despite those findings, the jurors were still directed to Question 7 and to determine plaintiff's damages, thus indicating to the jury that a finding of negligence and fault above 50 percent did not preclude recovery.

Questions 1 and 2 on the form asked the jurors whether defendant was negligent and, if so, whether its negligence was the proximate cause

of injury to plaintiff. The instructions told the jurors that if they answered "no" to either question, they should return the verdict without answering any other questions, including the last question, the one addressing plaintiff's damages. Thus, the form informed the jurors that a finding that defendant was not negligent or that its negligence did not cause injury to plaintiff would bar her recovery and thus avoid the need to determine her damages.

But the form went on to tell the jurors that if they answered "yes" to both Questions 1 and 2 – in other words, if they found that defendant *was* negligent and that its negligence *did* cause injury to plaintiff – they should proceed to Question 3, which asked whether plaintiff was negligent, and then proceed, directly or indirectly, to Question 7, the damages question. They were told to proceed to Question 7 directly, if their answer to Question 3 was "no," plaintiff was not negligent, and indirectly, if their answer was "yes," plaintiff was negligent. If the answer to Question 3 was "yes," they were sent to Question 7 to determine damages after a stop at Question 4 ("Was the plaintiff's negligence a proximate cause of injury or damage to the plaintiff?") and, depending on the answer there, a stop at Question 5 ("Was the fact the plaintiff was under the influence of alcohol a proximate cause of her injury?") and Question 6 (what is each party's share of fault?).

But, whatever the jurors' answers to Questions 3, 4, 5, and 6 – concerning plaintiff's negligence, intoxication, and share of the combined fault – they were directed to Question 7 to determine damages.

Even if the jurors answered "yes" to Questions 3, 4, and 5, thus finding that plaintiff's negligence and intoxication proximately caused her injuries, and also found, in answer to Question 6, that her fault exceeded defendant's, they still had to reach Question 7. The only finding that would render a determination of damages unnecessary was, again, a finding that defendant was not negligent ("no" to Question 1) or that its negligence was not a proximate cause of injury to plaintiff ("no" to Question 2).

The WSP could have requested language in the special verdict form to the effect that the jury should not determine damages if it apportions more than 50% fault to plaintiff. For example, the verdict form could have included a question between 6 and 7 that asked, "Is Peralta's fault greater than 50%? Yes or no. If your answer to question 6 is 'yes,' your verdict is for the defendant. Your presiding juror should sign this verdict form. Do not answer any more questions." But the WSP did not.

Instead, the message conveyed by the verdict-form instructions was the same as conveyed by the in-court instructions: a finding of

intoxication, proximate cause, and comparative fault above 50% did not bar an award of damages to plaintiff.

d. WSP waived its objection to damage award.

Even if the jury's verdict awarding Peralta damages could be construed as being inconsistent with the law that the jury was given, the time for the WSP to make that objection was prior to the jury's discharge.

Where jury verdict answers conflict with the instructions, a party generally waives any objection by failing to assert it before the trial court discharges the jury. *See Gjerde v. Fritzsche*, 55 Wn. App. 387, 393-94, 777 P.2d 1072 (1989); *Dormaier*, 177 Wn. App. at 868 n.13.

Here, the WSP failed to except or object to the award of damages to Peralta prior to the jury's discharge. 8C RP 1958-59. Thus, WSP has waived any inconsistency in the jury's award of damages. *Rasor v. Retail Credit* Co., 87 Wn.2d 516, 531-32, 554 P.2d 1041 (1976) (A juror's failure to follow the court's instructions inheres in the verdict.).

e. The trial court invaded the province of the jury.

The court must honor a verdict that reflects the intent of the jury and that is consistent with the law of this case. *Wright v. Safeway Stores, Inc.*, 7 Wn.2d 341, 344, 109 P.2d 542 (1941). The trial court is without the power to disregard the intent of the jury:

> "The court, however, has no power to supply substantial omissions, and the amendment in all cases must be such as

> to make the verdict conform to the real intent of the jury. If a general verdict is returned, and the amount which should have been found is a matter of mere computation and over which there is no controversy, the court may amend. But the court cannot, under the guise of amending a verdict, invade the province of the jury or substitute his verdict for theirs."

City Bond & Share, Inc. v. Klement, 165 Wash. 408, 410-11, 5 P.2d 523 (1931).

Here, the trial court rhetorically asked: "If they intended or if they wanted the Plaintiff to recover something, is that the real test here?" As long as the verdict is consistent with the law of the case, which here it is, then the answer to that question is a resounding "yes."

4. Conclusion

This Court should conclude that, under the law of this case, based on what the jurors were told (and also what they understood), plaintiff's intoxication and comparative fault does not bar her recovery, but merely reduces her damages.

To rule otherwise would not only be inconsistent with the law for *this* case, as explained above, but it would be inconsistent with the law for *all* cases, which holds that, "[i]n the construction of a verdict, the first object is to learn the intent of the jury[,]" so as to enter a conforming judgment. *Wright v. Safeway Stores*, 7 Wn.2d 341, 344, 109 P.2d 542

(1941); *see also Cameron v. Stack–Gibbs Lumber Co.*, 68 Wn. 539, 544, 123 P. 1001 (1912).

The law of the case is not the law of the case if it doesn't control the judgment. That is the very reason why trial courts are empowered to ask the jurors about their verdict, if there is the slightest doubt about their intent. As explained in *Smith v. S & F Const. Co.*, 62 Wn.2d 479, 481, 383 P.2d 300 (1963), "[a] trial court is justified in making such inquiry of jurors as to enable it to understand their will and intention, and their answers to such inquiry will be looked upon as an aid in the rendering of a proper judgment."

The goal – as always – is to ascertain the jurors' intent and give it effect in the ensuing judgment. *Malarkey Asphalt Co. v. Wyborney*, 62 Wn. App. 495, 814 P.2d 1219 (1991) ("Under Washington law, the trial court is charged with interpreting a verdict returned by a jury so as to ascertain and implement the jury's intent."). Here there is no doubt as to the jurors' intent. The verdict, the juror declarations, even the trial judge's on-the-record statements, all reflect the jurors' clear intent to award Peralta damages:

> The verdict as written accurately reflects the jury's decision to award Ms. Peralta compensation in the amount of $529,620.

Juror Foreman Hayes declaration CP 446. See also CP 447-453.

This Court should honor the jury's verdict in favor of Peralta. It reflects the undisputed intent of the jurors and is consistent with the law of this case as set out in their unchallenged instructions. *Wright v. Safeway Stores, Inc.*, 7 Wn.2d 341, 344, 109 P.2d 542 (1941).

Peralta is entitled to a judgment for the WSP's share of her damages. As a result, this Court should reverse the judgment and direct the trial court to enter a new one, in favor of plaintiff, and in the form she presented below.

B. ***Assignment of error No. 2 – The trial court erred in excluding Tanner's admission to a paramedic that he was exceeding the posted speed limit as hearsay.***

If Tanner was the one that told paramedic Van Zandt that his speed was 40-50 mph, then Van Zandt's testimony would clearly be admissible as a prior inconsistent statement under both ER 801 (d) and ER 613 (b).

The trial court, however, excluded testimony because the paramedic did not specifically identify Tanner as the source of the "40-50 mph" statement.

> MR. BLOOM: What about Tanner's own statement that he recalls the ambulance asking and giving an answer of 40? Can't ... I impeach that by the ambulance [paramedic] coming in and saying, my recollection is when we asked, it was 40 to 50.
>
> THE COURT: I don't believe so. Because there's no indication that that was his own statement. And that's the real problem, is we don't have a proper allocation of identity of who it was.

1 RP 22.

"Preliminary questions concerning ... the admissibility of evidence shall be determined by the court, subject to the provisions of section (b). ER 104(a)); *State v. Dixon*, 159 Wn.2d 65, 78-79, 147 P.3d 991 (2006). But "the trial court's proper inquiry under ER 104(b) is [limited] to whether the evidence is sufficient to support a finding of the needed fact." *State v. Dixon*, 159 Wn.2d at 78. Here, the inferences from the evidence are more than sufficient to establish that threshold finding that Tanner was the source of the statement.

Peralta's offer of proof included Tanner's deposition excerpt where he admitted that he likely responded to the paramedic's question about speed – though denied that he said "40 to 50 mph:"

> I recall one of the paramedics asking at some point -- and I believe they were exiting the rear of the ambulance -- for the approximate speed of the vehicle. And I recall saying about 40 miles per hour. I don't believe I said 48 to 50 miles per hour. That could have been somebody else she asked. I'm not sure. I don't know.
>
> But I recall telling them, or one of the –at some point, somebody asked me. I thought it was one of the paramedics. It could have been one of the deputies exiting. I don't know. I recall answering that question with it about 40 miles per hour.

CP 216-17.

Simply because Tanner disagrees about rate speed of speed that he gave to the paramedic – "40 mph" vs. "40 to 50 mph" – that does not

make the statement inadmissible. The opposing party does not need to agree to the content of the prior statement for it to be admissible. Indeed, the very purpose behind introducing a prior inconsistent statement is to prove a fact that opposing party is unwilling to concede.

Whether Tanner told the paramedic that his speed was "40 mph" or "40 to 50 mph" is a matter of fact to be determined by the jury, not a matter of admissibility to be determined by the judge.

The evidence was important. It was material to both negligence and causation. The faster one drives at night, the less time they have to react and avoid pedestrians.

More importantly, the paramedics testimony that Tanner admitted to traveling "40 to 50 mph" minutes after the collision would have contradicted Tanner testimony story and undermined his credibility, and Tanner's credibility was a critical issue in the case.

C. *Assignment of error No. 3 – The trial court erred in excluding the deposition testimony of WSP Sergeant Rhine that Tanner did not see Peralta before impact as hearsay.*

The trial court erred in imposing CR 32(a)(3)'s unavailability requirements on the admission of Sergeant Rhine's deposition testimony. CR 32(a)(3) applies to non-party witnesses. Sergeant Rhine is both a managing and speaking agent for the WSP. In other words, he is a party opponent.

Corporations and other legal entities such as the WSP speak through their agents. ER 801(d)(2) provides that "(iii) a statement by a person authorized by him to make a statement concerning the subject, or (iv) a statement by his agent or servant acting within the scope of his authority to make the statement for the party" is a party admission.

"In order for a statement to satisfy [ER 801(d)(2)'s agency] requirements, the declarant must be authorized to make the particular statement at issue, or statements concerning the subject matter, on behalf of the party." *Lockwood v. AC&S, Inc.*, 109 Wn. 2d 235, 262, 744 P.2d 605 (1987). In the absence of express authority, whether a declarant is authorized to make statements concerning a subject matter on behalf of a party, depends upon the "overall nature of his authority to act for the party." *Id.* at 262.

In *Lockwood*, the declarants did not have express authority to make the statements, but the court held "in light of the declarants' authority to act as health officials for Raymark, it is reasonable to infer that they were authorized to make statements about the subject of asbestos health issues on Raymark's behalf." *Id.*

Here, the WSP had granted Sergeant Rhine the authority to investigate collisions, make written findings and conclusions, and file reports reflecting those findings and conclusions. Sergeant Rhine not only

investigated Tanner's collision in his capacity as a WSP sergeant, but he made written findings and conclusions, and filed reports with WSP on his findings and conclusions. 8B RP 1851-52; Ex 237.

It is hard to imagine that Sergeant Rhine did not have the "overall," if not the "express," authority to make statements about his investigation of Tanner's collision. It is at the core of his WSP duties.

Thus, the trial court erred in imposing CR 32(a)(3)'s unavailability requirements to the admission of Rhine's deposition. The trial court should have applied Rule CR 32(a)(1) which allows the admission of a deposition of an adverse party for any purpose.

The excluded evidence was important. Tanner's prior inconsistent statements to Rhine contradicted and impeached Tanner's trial testimony. ER 801 (d) and ER 613 (b).

Sergeant Rhine's sworn testimony that Tanner told him that he did not see Peralta before impact also provided circumstantial evidence that Tanner did not have his headlights on at the time of impact. How else could he miss seeing Peralta if she was standing in the center of his lane?

But without Rhine's sworn testimony, the jury was free to believe Tanner's claim that he saw Peralta far enough in advance that he was able to execute a swerve prior to impact, which is strong circumstantial evidence that he had his headlights on at the time of impact.

D. ***Assignment of error No. 4 – The trial court erred in excluding the deposition testimony of WSP Detective Ortner that Peralta was obviously groggy during her hospital interview as hearsay.***

The trial court also erred in imposing CR 32(a)(3)'s unavailability requirements for non-party witnesses on the WSP Detective Ortner's deposition testimony. Detective Ortner's deposition testimony was also admissible as an opposing party admission. Plaintiff incorporates her legal argument under heading "C" above.

Detective Ortner had the "overall," if not the "express," authority from WSP to make statements about Tanner's collision. WSP specifically assigned Detective Ortner to investigate Tanner's collision, make written findings and conclusions, and file reports on his findings and conclusions with the WSP. 8B RP 1851-52; CP 525-26.

The excluded evidence was important. Ms. Peralta's hospital room statements provided the WSP with the only eyewitness account, other than Tanner's, that contradicts the four independent witnesses' testimony that Tanner's headlights were not on at the time of the collision. As the WSP emphasized in closing argument:

> You know, I guess at the end of the day, the place where those four witnesses' testimony fails is that it's entirely inconsistent with Ms. Peralta's own statements.

8B RP 1923.

Whether Peralta was "alert" and "coherent" during interview, as Deputy Taylor claimed, or whether she was obviously "groggy,' as WSP Detective Ortner testified, bears greatly on the reliability and accuracy of Peralta's statements. Had the jury heard that one of the WSP's own swore that that Peralta was "groggy" during the hospital bed interview, it would have cast a shadow on the reliability of that interview.

E. ***Assignment of error No. 5 – The trial court erred in excluding the prior consistent statements made by two eyewitnesses to Luann Pfleiger that Tanner was driving without his headlights on as hearsay.***

The trial court erred in excluding statements to Ms. Pfleiger on the grounds of hearsay. ER 801(d)(1)(ii) provides that a statement is not hearsay if the declarant testifies at trial, is subject to cross examination concerning the statement, and the statement is "consistent with his testimony and offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive." *See State v. Harper*, 35 Wn. App. 855, 857-58, 670 P.2d 296 (1983), *review denied*, 100 Wn.2d 1035 (1984) (A prior consistent statement is admissible to rehabilitate a witness that has been impugned by a suggestion of recent fabrication.)

The prior consistent statements made by eyewitnesses Kirchgatter and Riddell to Ms. Pfleiger met ER 801(d)(1)(ii)'s requirements. The WSP implied that the witnesses' accounts were fabricated years after the collision: "Now, unlike some of the witnesses whose testimony you will

hear in this case who came up with their story several years after the event ... ." 1 RP 127. The WSP cross examined both declarants about the collision when they testified. Kirchgatter's and Riddell's statements to Ms. Pfleiger were consistent with their trial testimony and were made on the night of the collision. Thus, the statements were not inadmissible hearsay, they were admissible prior consistent statements under ER 801(d)(1)(ii).

The excluded evidence was important. With no prior consistent statements to restrain it, WSP was free to argue that the eyewitness accounts were not only recent fabrications but were the result of plaintiff's investigator's undue influence:

> You know, part of the difficulty is that their statements and their collective recollection, aided with the help of Mr. Bloom's investigator some three years after the incident, a lot of time had passed, a lot had faded.

8B RP 1922. The WSP was able to paint these independent witnesses as part of a plaintiff conspiracy "determined to throw dirt on Sergeant Tanner." 8B RP 1916.

F. ***Assignment of error No. 6 – The trial court erred in excluding the deposition testimony of WSP Trooper Riddell that his brother reported to him after the collision that he witnessed the collision, on the grounds that its probative value was outweighed by ER 403 considerations of prejudice, confusion and delay.***

The trial court erred in excluding Rick Riddell's statements to his brother Trooper Greg Riddell under ER 403 "on the basis of prejudice, confusion or a waste of time." 8B RP 1854.

Evidentiary rulings are subject to review for abuse of discretion, but the exercise of discretion must be based on a correct view of the law and facts:

> A trial court abuses its discretion only if any of the following is true: (1) The decision is "manifestly unreasonable," that is, it falls "outside the range of acceptable choices, given the facts and the applicable legal standard"; (2) The decision is "based on untenable grounds," that is, "the factual findings are unsupported by the record"; or (3) The decision is "based on untenable reasons," that is, it is "based on an incorrect standard or the facts do not meet the requirements of the correct standard."

State v. Dye, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013).

The term "unfair prejudice" as it is used in ER 403 usually refers to prejudice that results from evidence that is "more likely to cause an emotional response than a rational decision among jurors." 5 KARL B. TEGLAND, *Courtroom Handbook on Washington Evidence* ch.5 at 236. There is nothing about the deposition testimony of Trooper Riddell that is unduly inflammatory or that would prevent the jury from making a rational decision.

Nor is there anything about the testimony that is confusing or would cause undue delay. The testimony is fairly short, straightforward and mundane – Rick Riddell contacted his brother, Trooper Riddell, about witnessing the Tanner collision, and Trooper Riddell reported that to his Sergeant.

But the evidence's probative value is great. Peralta intended to offer the testimony to rebut the WSP's claim that Rick Riddell's eyewitness account was recently fabricated. Rick Riddell's statement to his brother Trooper Riddell was made shortly after the collision. In addition, Trooper Riddell testified that after his brother reported it to him, he in turn reported it to WSP, through his Sergeant, that his brother had witnessed to Tanner's collision.

Had the evidence been admitted, the WSP could not have argued that Rick Riddell came up with his "statement ... with the help of Mr. Bloom's investigator some three years after the incident." Nor could the WSP have argued that "not one of [the eyewitnesses] gave any type of statement nor did they call the next day or the next day or the next day or any time in the next – well, to this day, never contacted the police to share this theory of what they believed they saw." 8B RP 1923.

Not only did the Rick Riddell's prior consistent statements predate Peralta's investigator's contact with him, but it showed Rick Riddell's efforts to to report what he saw to the police.

G. ***Assignment of error No. 7 – The trial court erred in ruling that Peralta's discovery admission that she was under the influence of alcohol constitutes an admission that she was impaired to an appreciable degree under RCW 46.61.502, as a matter of law.***

The trial court erred in ruling that Peralta was under the influence, as a matter of law. That ruling was incorporated into instruction 19 and

was tantamount to directing verdict against Peralta on contributory negligence and on an element of the WSP's RCW 5.40.060 affirmative defense.

The law has been long settled that when considering the trial court's ruling on a motion for a directed verdict on an element of a claim or defense, the evidence and all reasonable inferences therefrom must be viewed in a light most favorable to the defendant. *Davis v. Early Constr. Co., 63 Wn.2d 252*, 254, 386 P.2d 958 (1963). "It is only when the court can say that there is no evidence at all to support the party opposing the motion that such a motion can be granted." *Kaiser v. Suburban Transp. Sys.*, 65 Wn.2d 461, 463, 398 P.2d 14 (1965).

RCW 5.40.060's "complete defense" "to an action for damages for personal injury," requires defendant prove that plaintiff was under the influence of alcohol at the time of the collision. RCW 5.40.060 defines under the influence as "the same standard established for criminal convictions under RCW 46.61.502."

"[A] person is under the influence of or affected by the use of intoxicating liquor [as defined by RCW 46.51.502] if the person's ability to drive a motor vehicle is lessened in any appreciable degree." *State v. Arndt*, 179 Wn. App. 373, 386, 320 P.3d 104 (2014) (Citations omitted) (Bracketed language added for context). The jury was also instructed that

impairment to an "appreciable degree" is the standard for intoxication. Instruction 21, CP 364, app. H.

Peralta's admission that she was under the influence of alcohol is not the equivalent of an admission that her ability to drive a motor vehicle would have been impaired to an "appreciable degree." The standards are not the same, nor should they be.

It is common knowledge that consuming the smallest amount of alcohol, a bottle of beer or glass of wine, may influence a person's mental or physical faculties. But simply feeling the affects of alcohol does not mean a person's ability to drive is also adversely impaired to an "appreciable degree," or that they are in violation of the statute.

The law recognizes the difference:

> under Washington law a fact finder is not required to infer that if a defendant's mental or physical faculties are adversely affected his or her ability to drive also was affected.

State v. Arndt, 179 Wn. App. at 387.

Peralta admitted that she was under the influence of alcohol which she was ethically required to do if she had consumed alcohol, which in good faith she believed she did. She did not, however, admit that her level of influence was such that it adversely affected her ability to drive to an "appreciable degree." At a minimum, plaintiff's explanation of her intended meaning should have been enough to preclude the court from

deciding this issue against her as a matter of law, not to mention her refusal to admit in the same request for admission that her "judgment was impaired due to her earlier consumption of alcohol." CP 148.

In addition, the WSP was well aware that Peralta had consistently maintained that she had no recollection of the events leading up to the collision. In fact, they filed a pre-trial motion asserting she could not claim otherwise at trial. CP 114.

It has been long settled that whether an individual "was intoxicated or under the influence of liquor at the time of the accident *** are questions within the province of the jury." *Burget v. Saginaw Logging Co.*, 197 Wash. 318, 85 P.2d 271 (1938). The trial court's interpretation of Peralta's admission to mean that she was impaired, as defined by RCW 46.61.502, as a matter of law, took from the jury this significant factual issue.

Simply put, if reasonable minds can differ over an interpretation, then it is not a fact that should be determined as a matter of law. The trial court's interpretation of Peralta's admission, especially in light of her other discovery responses, was not sufficient to grant a directed verdict on an important element of a defense. The trial court erred.

The error was prejudicial. The trial court's ruling and subsequent instruction not only relieved the WSP of having to establish one of the

primary elements of its RCW 5.40.060 defense, but it also told the jury that plaintiff's intoxication constituted negligence as a matter of law.

Had Peralta been allowed to contest whether her alcohol consumption impaired her abilities to an "appreciable degree" as is required by RCW 46.61.502 (1), then the jury would have been free to believe Christian Price's trial testimony that when she picked up Peralta to go to the party she did not appear intoxicated, and while she was at the party, she did not observe Peralta consume any alcohol. 4A RP 800.

H. ***Assignment of error No. 8 – The trial court erred in compelling plaintiff to disclose her consulting expert's report and sanctioning her by barring her from presenting an alcohol expert at trial.***

1. Work product doctrine applied

Washington law is well settled. Defendant is not entitled to discover the facts and opinions held by experts that plaintiff does not intend to call at trial. CR 26(b)(5)(B); *Mothershead v. Adams,* 32 Wn. App. 325, 327-28, 647 P.2d 525 (1982). "The opinions and even identities of these 'consulting experts' are protected because they are considered part of the party's team and their opinions are treated as work product." *Stevens v. Gordon*, 118 Wn. App. 43, 50, 74 P.3d 653 (2003).

There is no dispute that Dr. Brady was a consulting expert. Thus, his opinion and identity should have been protected as work product. Judge Wulle erred.

2. The sanction was an abuse of discretion

Even if Judge Wulle's interpretation of the work product doctrine were defensible, prohibiting plaintiff from presenting an alcohol expert at trial as a sanction was an abuse of discretion. *Jones v. City of Seattle,* 179 Wn.2d 322, 371, 314 P.3d 380 (2013)*; Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 495-96, 933 P.2d 1036 (1997).

To start with, the WSP did not request the sanction. Thus, Peralta had no notice that WSP would be seeking the sanction. The only sanction that the WSP sought was costs and fees pursuant to CR 37(a)(4), and those were not awarded. CP 89.

Second, in punishing a discovery violation, "the court should impose the least severe sanction that will be adequate to serve the purpose of the particular sanction, but not be so minimal that it undermines the purpose of discovery." *Burnet*, 131 Wn.2d 495-96. When imposing a severe sanction such as witness exclusion, "the record must show three things—the trial court's consideration of a lesser sanction, the willfulness of the violation, and substantial prejudice arising from it." *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 688, 132 P.3d 115 (2006) (relying on *Burnet*, 131 Wn.2d at 494).

Here, Judge Wulle's order contains no findings of willfulness, prejudice, or consideration of lesser sanctions other than fees which he reserved. CP 106-07.

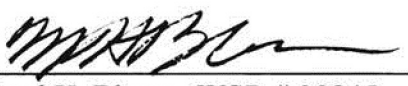
Judge Wulle's error prejudiced Peralta. Although the trial court had directed verdict against Peralta on intoxication based on her discovery response, Peralta could still have challenged the lab test findings or at the least cross examined the WSP's expert on the material errors in lab tests. All this could have lessened the impact of intoxication on the allocation of fault, which was very close to 50 percent.

V.
CONCLUSION

Peralta is entitled to a judgment for the WSP's share of her damages. It reflects the undisputed intent of the jurors and is consistent with the law of this case as set out in their unchallenged instructions. This Court should reverse the judgment and direct the trial court to enter a new one, in favor of plaintiff, and in the form she presented below.

In the alternative, the trial court errors require a reversal of the trial court judgment and a remand for a new trial.

Respectfully submitted,



Michael H. Bloom, WSB # 30845
Donald Jacobs, WSB # 9300
Attorney for Appellant

APPENDIX

§ 5.40.060. Defense to personal injury or wrongful death action -- Intoxicating liquor or any drug

(1) Except as provided in subsection (2) of this section, it is a complete defense to an action for damages for personal injury or wrongful death that the person injured or killed was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and that such condition was a proximate cause of the injury or death and the trier of fact finds such person to have been more than fifty percent at fault. The standard for determining whether a person was under the influence of intoxicating liquor or drugs shall be the same standard established for criminal convictions under RCW 46.61.502, and evidence that a person was under the influence of intoxicating liquor or drugs under the standard established by RCW 46.61.502 shall be conclusive proof that such person was under the influence of intoxicating liquor or drugs.

(2) In an action for damages for personal injury or wrongful death that is brought against the driver of a motor vehicle who was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and whose condition was a proximate cause of the injury or death, subsection (1) of this section does not create a defense against the action notwithstanding that the person injured or killed was also under the influence so long as such person's condition was not a proximate cause of the occurrence causing the injury or death.

§ 46.61.502. Driving under the influence

(1) A person is guilty of driving while under the influence of intoxicating liquor, marijuana, or any drug if the person drives a vehicle within this state:

(a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or

(b) The person has, within two hours after driving, a THC concentration of 5.00 or higher as shown by analysis of the person's blood made under RCW 46.61.506; or

(c) While the person is under the influence of or affected by intoxicating liquor, marijuana, or any drug; or

(d) While the person is under the combined influence of or affected by intoxicating liquor, marijuana, and any drug.

(2) The fact that a person charged with a violation of this section is or has been entitled to use a drug under the laws of this state shall not constitute a defense against a charge of violating this section.

(3) (a) It is an affirmative defense to a violation of subsection (1)(a) of this section, which the defendant must prove by a preponderance of the evidence, that the defendant consumed a sufficient quantity of alcohol after the time of driving and before the administration of an analysis of the person's breath or blood to cause the defendant's alcohol concentration to be 0.08 or more within two hours after driving. The court shall not admit evidence of this defense unless the defendant notifies the prosecution prior to the omnibus or pretrial hearing in the case of the defendant's intent to assert the affirmative defense.

(b) It is an affirmative defense to a violation of subsection (1)(b) of this section, which the defendant must prove by a preponderance of the evidence, that the defendant consumed a sufficient quantity of marijuana after the time of driving and before the administration of an analysis of the person's blood to cause the defendant's THC concentration to be 5.00 or more within two hours after driving. The court shall not admit evidence of this defense unless the defendant notifies the prosecution prior to the omnibus or pretrial hearing in the case of the defendant's intent to assert the affirmative defense.

(4) (a) Analyses of blood or breath samples obtained more than two hours after the alleged driving may be used as evidence that within two hours of the alleged driving, a person had an alcohol concentration of 0.08 or more in violation of subsection (1)(a) of this section, and in any case in which the analysis shows an alcohol concentration above 0.00 may be used as evidence that a person was under the influence of or affected by intoxicating liquor or any drug in violation of subsection (1)(c) or (d) of this section.

(b) Analyses of blood samples obtained more than two hours after the alleged driving may be used as evidence that within two hours of the alleged driving, a person had a THC concentration of 5.00 or more in violation of subsection (1)(b) of this section, and in any case in which the analysis shows a THC concentration above 0.00 may be used as evidence that a person was under the influence of or affected by marijuana in violation of subsection (1)(c) or (d) of this section.

(5) Except as provided in subsection (6) of this section, a violation of this section is a gross misdemeanor.

(6) It is a class C felony punishable under chapter 9.94A RCW, or chapter 13.40 RCW if the person is a juvenile, if:

(a) The person has four or more prior offenses within ten years as defined in RCW 46.61.5055; or

(b) The person has ever previously been convicted of:

(i) Vehicular homicide while under the influence of intoxicating liquor or any drug, RCW 46.61.520(1)(a);

(ii) Vehicular assault while under the influence of intoxicating liquor or any drug, RCW 46.61.522(1)(b);

(iii) An out-of-state offense comparable to the offense specified in (b)(i) or (ii) of this subsection; or

(iv) A violation of this subsection (6) or RCW 46.61.504(6).

WAC 448-14-020. Operational discipline of blood samples for alcohol.

(1) Analytical procedure.

(a) The analytical procedure should include:

(i) A control test

(ii) A blank test

(iii) Duplicate analyses that agree to within plus or minus ten percent of their mean.

(b) All sample remaining after analysis should be retained for at least three months under suitable storage conditions for further analysis if required.

(c) Each analyst will engage in a proficiency test program in which some blood samples containing alcohol are exchanged with other laboratories and tested so that the proficiency of each analyst and the precision and accuracy of the test method can be evaluated no less than one time per year.

(2) Reporting procedure.

(a) The results should be expressed as grams of alcohol per 100 mL of whole blood sample.

(b) The analysis results should be reported to two significant figures.

(c) Blood alcohol results on living subjects of 0.009 grams of alcohol per 100 mL or lower will be reported as negative. Blood alcohol results on post-mortem samples of 0.019 grams of alcohol per 100 mL or less will be reported as negative. (See WAC 448-14-010 (2)(b))

(3) Sample container and preservative.

(a) A chemically clean dry container consistent with the size of the sample with an inert leak-proof stopper will be used.

(b) Blood samples for alcohol analysis must be preserved with an anticoagulant and an enzyme poison sufficient in amount to prevent clotting and stabilize the alcohol concentration. Suitable preservatives and anticoagulants include the combination of sodium fluoride and potassium oxalate.

Statutory Authority: RCW 46.61.506. 10-24-067, § 448-14-020, filed 11/30/10, effective 12/31/10; Order 4, § 448-14-020, filed 7/9/70; Emergency and Permanent Order 3, § 448-14-020, filed 9/23/69.

INSTRUCTION NO. 7

Contributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage claimed.

If you find contributory negligence, you must determine the degree of negligence, expressed as a percentage, attributable to the person claiming injury or damage. The court will furnish you a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

INSTRUCTION NO. 18

A person who becomes intoxicated voluntarily is held to the same standard of care as one who is not so affected. Whether a person is intoxicated at the time of an occurrence may be considered by the jury, together with all the other facts and circumstances, in determining whether that person was negligent.

INSTRUCITON NO. 19

It is a defense to an action for damages for personal injuries that the person injured was then under the influence of alcohol, that this condition was a proximate cause of the injury, and that the person injured was more than fifty percent at fault.

INSTRUCTION NO. 20

To establish the defense that the person injured was under the influence, the defendant has the burden of proving each of the following propositions:

First, that the person injured was under the influence of alcohol at the time of the occurrence causing the injury. Plaintiff admits this element.

Second, that this condition was a proximate cause of the injury; and

Third, that the person injured was more than fifty percent at fault.

If you find from your consideration of all the evidence that each of these propositions has been proved, then this defense has been established.

INSTRUCTION NO. 21

A person is under the influence of alcohol if, as a result of using alcohol, the person's ability to act as a reasonably careful person under the same or similar circumstances is lessened in any appreciable degree.

NO. 22

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, then you must first determine the amount of money required to reasonably and fairly compensate the plaintiff for the total amount of such damages as you find were proximately caused by the negligence of the defendant, apart from any consideration of contributory negligence.

If you find for the plaintiff, your verdict must include the following undisputed items:

$127,583.99 in past medicals bills.

In addition, you should consider the following past economic damages elements:

The reasonable value of earnings lost to present.

In addition, you should consider the following future economic damages elements:

The reasonable value of earnings with reasonable probability to be lost in the future.

The reasonable value of necessary medical care, treatment, and services with reasonable probability to be required in the future.

In addition you should consider the following noneconomic damages elements:

The nature and extent of the injuries.

The pain and suffering, both mental and physical experienced and with reasonable probability to be experienced in the future.

The disability and loss of enjoyment of life experienced and with reasonable probability to be experienced in the future.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

2

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY

FILED
SEP 20 2013
Scott G. Weber, Clerk, Clark Co.

DEBORAH PERALTA, Plaintiff,	)	No. 10-20 4894-8
vs.	)	SPECIAL VERDICT FORM
THE STATE OF WASHINGTON, and WASHINGTON STATE PATROL, Defendants.	)	

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: Was the defendant negligent?

ANSWER: yes **(Write "yes" or "no")**

If you answered "no" to Question 1, sign this verdict form. If you answered "yes" to Question 1 answer Question 2.

QUESTION 2: Was the defendant's negligence a proximate cause of injury to the plaintiff?

ANSWER: yes **(Write "yes" or "no")**

If you answered "no" to Question 2, sign this verdict form. If you answered "yes" to Question 2, answer Question 3.

QUESTION 3: Was the plaintiff negligent?

ANSWER: yes **(Write "yes" or "no")**

If you answered "yes" to Question 3, answer Question 4. If you answered "no" to Question 3, skip to Question 7.

0-000000387

QUESTION 4: **Was the plaintiff's negligence a proximate cause of the injury or damage to the plaintiff?**

ANSWER: yes **(Write "yes" or "no")**

If you answered "yes" to Question 4, answer Question 5. If you answered "no" to Question 4, skip to Question 7.

QUESTION 5: **Was the fact that plaintiff was under the influence of alcohol a proximate cause of her injury?**

ANSWER: yes **(Write "yes" or "no")**

QUESTION 6 **Assume that 100% represents the total combined fault that proximately caused the plaintiff's injury. What percentage of this 100% is attributable to the plaintiff's negligence and what percentage of this 100% is attributable to the negligence of the defendant? Your total must equal 100%.**

ANSWER:

To Plaintiff Deborah Peralta: 58 %

To Defendant Washington State Patrol: 42 %

QUESTION 7: **What is the total amount of plaintiff's damages?**

Economic Damages: $ 511,000
Non-economic Damages: $ 750,000

TOTAL: $ 1,261,000

Sign this verdict form and notify the bailiff.

DATE: 9/20/13

Presiding Juror

Jury polled 12:0
9-20-13 clerk Joe Johnson

CERTIFICATE

I certify that I mailed a copy of APPELLANT'S OPENING BRIEF to Steve Puz and Patricia Todd, State of Washington, AAG. PO Box 40126 Olympia, Washington 98504-1103, Attorneys for Respondents, postage prepaid, on August 15, 2014.

Michael H. Bloom
Attorney for Appellant